



BILLING CODE: 4410-09-P

**DEPARTMENT OF JUSTICE
Drug Enforcement Administration**

**[Docket No. 16-15]
Nicholas J. Nardacci, M.D.
Decision And Order**

On December 7, 2015, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Nicholas J. Nardacci, M.D. (hereinafter, Respondent), of Albuquerque, New Mexico. Show Cause Order, at 1. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration AN9444592, pursuant to which he is authorized to dispense controlled substances in schedules II through V as a practitioner, as well as the denial of pending applications, on the ground that Respondent does not have authority to dispense controlled substances in New Mexico, the State in which he is registered with the Agency. *Id.* (citing 21 U.S.C. §§ 823(f) and 824(a)(3)).

As factual support for the proposed actions, the Show Cause Order alleged that Respondent's medical license had expired on July 14, 2014 and had not been reinstated by the New Mexico Medical Board. *Id.* The Show Cause Order also alleged that Respondent's New Mexico controlled substance license had expired on October 31, 2013 and had not been reinstated by the New Mexico Pharmacy Board. *Id.* The Show Cause Order thus alleged that Respondent is currently without authority to handle controlled substances in New Mexico, the State in which he is registered, *id.*, and therefore, his DEA registration is subject to revocation.¹ *Id.* at 2.

¹ The Show Cause Order also notified Respondent of his right to request a hearing on the allegations or submit a written statement while waiving his right to a hearing, and the procedure for electing either option. Show Cause Order, at 2 (citing 21 CFR 1301.43).

On December 18, 2015, the Government accomplished service of the Show Cause Order on Respondent as evidenced by the signed return-receipt card. On January 19, 2016, Respondent requested a hearing on the allegations as well as an extension of time to find an attorney. The matter was placed on the docket of the Office of Administrative Law Judges and assigned to ALJ Charles Wm. Dorman.

On January 20, 2016, the ALJ issued an Order which directed the Government to submit evidence supporting the allegation and an accompanying dispositive motion by February 4, 2016. The ALJ also granted Respondent's request for an extension and ordered that if the Government filed such a motion, Respondent was to file his reply by February 25, 2016. Briefing Schedule For Lack Of State Authority Allegations, at 1.

On February 4, 2016, the Government filed its Motion for Summary Disposition. As support for its Motion, the Government provided a copy of Respondent's registration information, an affidavit from a Diversion Investigator (DI) and printouts she obtained from the New Mexico Medical Board and New Mexico Board of Pharmacy.² The Medical Board printout showed that Respondent's medical license had expired on July 1, 2014 and subsequently lapsed. As for the Pharmacy Board printout, it showed that Respondent's state controlled substance license had expired on October 31, 2013. The Government thus argued that Respondent is without authority to dispense controlled substances in New Mexico and does not possess the authority required by the Controlled Substances Act to be registered and therefore, his registration should be revoked. Mot. at 5.

On February 18, 2016, Respondent submitted a letter to the ALJ wherein he noted that he was negotiating with the Medical Board over the withdrawal of his application for reinstatement

² The DI averred that during a phone conversation with Respondent, he acknowledged that both of his state licenses had expired. DI Declaration, at 2.

of his state license. Letter from Respondent to Hearing Clerk, OALJ (Feb. 16, 2016).

Respondent further requested that the ALJ grant him “a 30 day extension to” allow him “to reach a settlement with the Medical Board” after which he would either withdraw his DEA application or challenge the Show Cause Order. *Id.* Respondent explained that the Board was requiring him to pass a competency exam in order to be reinstated; he also noted that he was having difficulty finding an attorney he could afford. *Id.* at 2. Respondent attached to his letter, a December 31, 2015 letter from the New Mexico Board informing him that the Board was offering him the opportunity to withdraw his application, but that if he chose not to do so, the Board would issue him a Notice of Contemplated Action to deny the reinstatement of his license. *Id.* at 3. Respondent did not, however, dispute the Government’s contention that he is currently without state authority to dispense controlled substances in New Mexico.

Thereafter, the ALJ denied Respondent’s request for a second extension, finding unpersuasive his contention that he was in negotiations with the Board to reach a settlement and needed more time. Order Denying The Resp.’s Request For An Extension, Order Granting Summary Judgment, And Recommended Rulings, Findings Of Fact, Conclusions Of Law, And Decision, at 3. The ALJ also found unpersuasive Respondent’s other justification for needing an extension, *i.e.*, that he needed more time to find a lawyer, noting that Respondent had more than two months to find one. *Id.*

Turning to the Government’s Motion, the ALJ found that there was no factual dispute that Respondent does not possess state authority to dispense controlled substances and thus cannot maintain his DEA registration. *Id.* at 4. The ALJ thus granted the Government’s Motion and recommended that Respondent’s registration be revoked and that any pending application be denied. *Id.*

Neither party filed exceptions to the ALJ's Recommended Decision. Thereafter, the record was forwarded to my Office for Final Agency Action. Having considered the record in its entirety, I adopt the ALJ's rulings, as well as his findings of fact, legal conclusion and recommended sanction. I make the following finding of fact.

FINDINGS

Respondent was the holder of DEA Certificate of Registration AN9444592, pursuant to which he was authorized to dispense controlled substances in schedules II through V as a practitioner at the registered address of 2919 Commercial Street, NE, Albuquerque, New Mexico; this registration had an expiration date of October 31, 2014. Motion for Summ. Disp., Attachment 1, at 1. Because Respondent did not submit a renewal application until November 28, 2014, this registration expired, in accordance with its terms, on October 31, 2014. *Id.* However, because there is a pending application, this case remains a live controversy.

Respondent also formerly held a medical license issued by the New Mexico Medical Board. However, Respondent's license expired on July 1, 2014 and was subsequently deemed by the Board to have lapsed. Moreover, according to the online records of the New Mexico Medical Board of which I take official notice, on February 22, 2016, Respondent entered into a Stipulation And Order For Withdrawal Of Application For Licensure, which the Board approved on February 29, 2016, pursuant to which he agreed to withdraw his Application for Reinstatement.³

³ Under the Administrative Procedure Act (APA), an agency "may take official notice of facts at any stage in a proceeding-even in the final decision." U.S. Dept. of Justice, *Attorney General's Manual on the Administrative Procedure Act* 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). In accordance with the APA and DEA's regulation, Respondent is "entitled on timely request to an opportunity to show to the contrary." 5 U.S.C. § 556(e); *see also* 21 CFR 1316.59(e). Respondent may dispute my finding by filing a properly supported motion within fifteen calendar days of this Order which shall commence on the date this Order is mailed.

Respondent also formerly held a New Mexico Controlled Substances license. However, this license expired on October 31, 2013.

DISCUSSION

Pursuant to 21 U.S.C. § 823(f), “[t]he Attorney General shall register practitioners . . . to dispense . . . controlled substances . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.” *Id.* § 823(f). Moreover, the Controlled Substances Act defines the term “practitioner” to “mean[] a physician . . . licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . to distribute, dispense, [or] administer . . . a controlled substance in the course of professional practice.” *Id.* § 802(21). *See also id.* § 824(a)(3) (authorizing the revocation of a registration upon a finding that the registrant “has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances”). Based on these provisions, the Agency has repeatedly held “that a practitioner can neither obtain nor maintain a DEA registration unless the practitioner currently has authority under state law to handle controlled substances.” *James L. Hooper*, 76 FR 71371, 71372 (2011) (collecting cases), *pet. for rev. denied*, *Hooper v. Holder*, 481 F. App’x 826 (4th Cir. 2012).

Here, there is no dispute as to the material fact that Respondent does not hold authority under New Mexico law to dispense controlled substances and is thus not a practitioner within the meaning of the Act. *See* 21 U.S.C. § 802(21). Accordingly, his application must be denied. 21 U.S.C. § 823(f).

ORDER

Pursuant to the authority vested in me by 21 U.S.C. § 823(f) and 28 CFR 0.100(b), I order that the application of Nicholas J. Nardacci, M.D., for a DEA Certificate of Registration as a practitioner, be, and it hereby is, denied. This Order is effective immediately.

Dated: July 11, 2016

Chuck Rosenberg
Acting Administrator

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